STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION LOCAL NO. 662, Complainant,

vs.

CITY OF MARSHFIELD, WASTE WATER TREATMENT PLANT, Respondent.

Case 125
No. 54509
MP-3225

Decision No. 28973-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi E. Soldon,** 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of General Teamsters Union Local No. 662.

Ruder, Ware & Michler, S.C., by **Attorney Dean R. Dietrich,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of City of Marshfield.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 18, 1997, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the Respondent City of Marshfield had not violated its duty to bargain in good faith with Respondent Teamsters. He therefore dismissed the complaint.

Teamsters timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs.111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received January 29, 1998.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

Examiner Findings of Fact 1-4 are affirmed.

Examiner Finding of Fact 5 is affirmed in part and reversed in part by the addition of the underlined words and the deletion of the stricken through words as follows:

> 5. In the fall of 1995, the City's Common Council determined that a wage increase of 2.75 percent would be granted City employes for the 1996 year and that if a higher wage increase was obtained by employes through the collective bargaining process, layoffs would occur to reduce the effective cost of the wage increase to 2.75 percent. Nicole Onder, Human Resources Specialist and the City's representative in collective bargaining, ~~conveyed~~ was responsible for conveying this information to the various bargaining units in the City of Marshfield but, at least as to the Teamsters bargaining unit, failed to do so.

Examiner Finding of Fact 6 is affirmed and modified through the addition of the underlined words:

> Early in the bargaining process, Teamster steward and bargaining team member Mrotek told Dickrell that the City had advised the AFSCME street department employes that layoffs would occur if the contract settlement exceeded a certain level of wage increase.

Examiner Findings of Fact 7 - 23 are affirmed.

Examiner Conclusion of Law 1 is affirmed.

Examiner Conclusion of Law 2 is set aside.

Examiner Order is affirmed in part and reversed in part as follows:

Examiner Conclusion of Law 3 is reversed and set aside and the following Conclusion of Law is made:

> 2. During the August 27, 1996 meeting with employes, the City of Marshfield engaged in individual bargaining with employes represented by Teamsters and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats

H. Examiner Order is affirmed in part and reversed in part as follows:

ORDER

> To remedy the violation of the Municipal Employment Relations Act found in Conclusion of Law 2 in a manner which effectuates the purposes of the Act, IT IS ORDERED that the City of Marshfield, its officers and agents, shall immediately:
>
> Cease and desist from violating its duty to bargain under the Municipal

Employment Relations Act by bargaining with employes in the absence of their collective bargaining representative, Teamsters Union Local No. 662.

2. Take the following affirmative action:

Notify all of its employes represented by Teamsters Union Local No. 662 by posting, in conspicuous places on its premises where employes are employed, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by an official of the City and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all complaint allegations aside from the violation found in Conclusion of Law 2 are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT violate our duty to bargain under the Municipal Employment Relations Act by bargaining with employes in the absence of their collective bargaining representative, Teamsters Union Local No. 662.

_____ _____

City of Marshfield Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

City of Marshfield, Waste Water Treatment Plant

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings

In its complaint, Teamsters Local No. 662 alleges that the City of Marshfield engaged in bad faith bargaining and therefore violated Sec. 111.70(3)(a)4, Stats. by negotiating a tentative agreement without advising Teamsters that the wage increase tentatively agreed upon would require layoffs and by then bargaining directly with employes instead of through Teamsters. Teamsters ask that the City be ordered to cease and desist from such conduct and to make the laid off employes whole.

In its answer, the City of Marshfield denies having engaged in bad faith bargaining and asserts Teamsters were aware that layoffs would occur if settlements were reached above a specified level. The City asks that the complaint be dismissed.

The Examiner's Decision

The Examiner dismissed the complaint based on his conclusions that the City had not engaged in bad faith bargaining.

As to the alleged failure to provide relevant information to Teamsters regarding the layoff consequences of any wage settlement in excess of a 2.75 percent, the Examiner found that: (1) Teamsters were generally aware of the City's position at the commencement of bargaining with all City units that any wage increase over 2.75 percent would result in employe layoffs; (2) Teamsters never asked for this information and thus the City had no obligation to provide same; and (3) the City did specifically advise employes after the 3 percent wage increase tentative agreement was reached but before union ratification that if the 3 percent settlement was ratified, layoffs would occur.

Turning to the alleged effort by the City to deal directly with employes while bypassing the Teamsters, the Examiner found that the City was not bargaining with employes when it advised them that the 3 percent tentative agreement would cause layoffs if ratified. Rather, the Examiner determined that the City was exercising its right to truthfully communicate to employes regarding bargaining issues. The Examiner further concluded that although the Teamsters business agent was not notified of or present at the employe meeting, the employes did have Teamster representation in the form of the bargaining team and union stewards. The Examiner also noted that the Teamster business agent subsequently became aware of the meeting and its content prior to the unit's ratification vote. In addition, the Examiner rejected Teamster's contention that the City's meeting with employes was an effort to undermine the tentative agreement.

POSITIONS OF THE PARTIES ON REVIEW

Teamsters

Teamsters contend the Examiner erred when he dismissed the complaint and urge reversal of the Examiner's decision.

Looking first at the issue of the City's alleged failure to provide layoff information during bargaining, Teamsters assert there is no credible evidence in the record to support the Examiner's finding that Teamsters were generally aware that a wage settlement in excess of 2.75 percent would produce layoffs. Teamster further argue that because they had no knowledge of the potential for layoffs, it is unreasonable to place the burden on them to ask for that information. Teamsters contend that the City had an affirmative duty to provide it with the layoff information and that the City's failure to do so violated Sec. 111.70(3)(a) 4, Stats.

As to the City's meeting with employes prior to ratification, Teamsters argue the City did not simply communicate an offer to employes but rather urged employes to reject the 3 percent tentative agreement in favor of a 2.75 percent agreement which would not require layoffs. Teamsters contend this is particularly so when a 2.75 percent offer had never been made prior to the employe meeting and certainly was not part of the tentative agreement. Teamsters assert the City was attempting to sabotage the tentative agreement.

Teamsters further urge rejection of the Examiner's view that the City was not engaging in illegal direct dealing because union stewards and the employe members of the bargaining team were present at the meeting. Teamsters argue the business representative was the employes' representative and that the City illegally bargained with employes in his absence.

Given all of the foregoing, the Teamsters ask that the City be found to have violated Sec. 111.70(3)(a)4, Stats., and that the City be ordered to cease and desist from such conduct and to make the laid off employes whole.

The City

The City contends the Examiner's decision correctly applied the facts to existing law.

The City asserts the Examiner correctly found that the Teamsters were aware of the potential for layoffs and that, in any event, Teamsters could easily have asked about the implications of a 3 percent settlement. The City further notes that it is undisputed that prior to employe ratification of the 3 percent tentative agreement, the employes and ultimately the Teamster business representative were made aware that a 3 percent wage settlement would produce layoffs. By then ratifying the 3 percent wage settlement with knowledge of the consequences, the City argues the Teamsters accepted the resulting layoffs as a legitimate consequence of the contract settlement.

The City argues the Examiner correctly concluded that its meeting with employes was

simply an effort to convey information and did not constitute bargaining directly with employes or an effort to sabotage the tentative agreement.

Given the foregoing, the City asks that the Examiner's decision be affirmed in its entirety.

DISCUSSION

On August 26, 1996, the City ratified a three year 1996-1998 tentative agreement it had reached with Teamsters which, among other matters, provided annual wage increases of 3 percent. On August 27, 1996, following instructions from the City Administrator and the

City Council, Waste Water Treatment Plant Superintendent Dickrell told Teamsters unit employes that if they ratified the tentative agreement, there would be unit employe layoffs but that if the tentative agreement were modified to include annual wage increases of only 2.75 percent, no layoffs would occur. On August 28, 1996, Teamster unit employes ratified the 3 percent wage increase tentative agreement. Two bargaining unit employes were subsequently laid off for one week.

The Duty To Provide Information

The duty to bargain in good faith under the Municipal Employment Relations Act includes a requirement that, where appropriate, municipal employers provide the collective bargaining representative of their employes with information which is relevant and reasonably necessary to bargaining a successor contract or administering the terms of an existing agreement. MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-B (WERC, 9/88).

Teamsters contend the relationship between a 3 percent settlement and layoffs had never been communicated by the City prior to August 27, 1996 and that the City's conduct constituted an improper failure to timely provide information relevant and necessary to the bargaining over a successor agreement.

It is undisputed that the layoff information was "relevant and reasonably necessary" to the Teamsters' ability to bargain a successor agreement. What is disputed is whether the City's conduct as to this information violated its duty to bargain.

As a threshold defense, the City contends that it provided the information to Teamsters. The City asserts that both in the Fall of 1995, prior to or at the commencement of bargaining with all bargaining units (including Teamsters), and specifically during a December 1995 bargaining session with Teamsters, Human Resources Specialist Nicole Onder advised Teamsters that any wage settlement beyond 2.75 percent would require layoffs.

The Examiner generally found Onder was not a credible witness and specifically concluded that she did not convey the layoff information to Teamsters in December 1995. We conclude this Finding is fully supported by the record.

Nonetheless, the Examiner generally concluded that the layoff information had been communicated to "the various bargaining units in the City of Marshfield" -presumably including Teamsters. While he found Onder to be a less than truthful witness, he apparently and inexplicably credited the portion of her testimony which indicates that she had generally communicated layoff information to all units. From our review of the record, we do not find the Examiner's Finding of Fact to be correct. We conclude that prior to August 27, 1996, the City never specifically advised Teamsters that unit layoffs would occur if the wage settlement exceeded 2.75 percent.

We reach this conclusion for several reasons. The Examiner found, and we concur, that Onder was not a credible witness. Thus, her testimony is not a particularly reliable basis for an evidentiary finding that the layoff information was ever conveyed by the City to Teamsters. On the other hand, Teamsters bargaining unit members who were present at all bargaining sessions testified that the layoff information was never presented prior to the August 1996 meeting with Dickrell. Teamsters business representative Konop testified that the layoff information was never communicated to him by the City. Dickrell was present at all

bargaining sessions and could not recall the layoff information ever being communicated. There is no written evidence that the layoff information was ever communicated to Teamsters. Finally, the City's interest in having Dickrell present the information on August 27, 1996 is consistent with there having been no prior communication thereof.

The City's next line of defense is that Teamsters could have but did not ask for the layoff information and that, in the absence of a request, the City had no duty to bargain obligation to provide same. The Examiner found this argument persuasive. On review, Teamsters assert they had no reason to ask for the information and that it is therefore unreasonable to hold their failure to make a request against them.

Where a union has no reason to know that it should ask for certain relevant and reasonably necessary information, there may be circumstances in which the employer's failure to provide said information violates the duty to bargain in good faith. In such circumstances, a union's failure to ask for the information is not a valid defense. Here, from our review of the record as a whole, we are satisfied the Teamsters knew or should have known that there was a potential linkage in bargaining between certain wage settlement levels and possible layoffs. Under such circumstances, it is reasonable to expect Teamsters to have asked the City whether layoffs were a potential problem in the Teamsters unit. Given the Teamsters' failure to ask for the information, we find that the City's failure to provide the information prior to August 27, 1996 did not violate the duty to bargain.

We base our conclusion that Teamsters knew or should have known enough to ask the layoff question based primarily on unrebutted testimony from Dickrell. He testified that he had a 1995 conversation "when negotiations began" which was initiated by Teamster steward and bargaining team member Mrotek during which Mrotek told Dickrell that the City had advised the "street department employes" that layoffs would occur if the contract settlement exceeded a certain level of wage increase. Mrotek's knowledge of the City's position with another City employe unit placed Teamsters in the position of knowing enough to ask the City whether the same wage/layoff relationship was operative for the Teamster unit. The Examiner found that Teamsters' business representative Konop was also generally aware from a conversation with an AFSCME representative of the City's bargaining position that layoffs would occur if the wage settlement

exceeded a certain level. While such an inference can be drawn from Konop's testimony, this inference is less than compelling and thus we do not rely on it in any significant way when reaching our conclusions about what Teamsters knew or should have known. We do note, however, that it seems quite likely that Mrotek would have shared his knowledge of "the street department employes'" layoff issue with Konop. Secondarily, we note that the publicly available minutes of the June 27, 1995 City of Marshfield Common Council clearly reflect the fiscal budgetary pressures the City was under as it approached bargaining with its various unions.

Given all of the foregoing, we conclude that the City's failure to provide the Teamsters with the layoff information prior to August 27, 1996 did not violate the City's duty to bargain in good faith.

The August 27, 1996 Meeting

There remains the question of whether the City engaged in illegal individual bargaining/direct dealing when Dickrell met with employes on August 27, 1996. The Examiner concluded that no violation of the duty to bargain occurred at this meeting because Dickrell was simply providing information to the employes regarding the City's bargaining position and because the employe members of the Teamsters bargaining team were present. We conclude otherwise.

We think it clear that Dickrell did more than provide information to the employes regarding the layoffs which would occur if the 3 percent tentative agreement were ratified by the employes the next day. He went on to indicate that if the parties were to agree to a 2.75 percent increase, no layoffs would occur. Through this conduct, Dickrell in effect made a bargaining proposal directly to the employes in the absence of their chosen representative, Teamster business representative Konop. Through this conduct, the City violated its duty to bargain with the representative of the employes. Therefore, we have reversed the Examiner's conclusion to the contrary. 1/

REMEDY

By way of remedy, Teamsters ask that the City be ordered to cease and desist from violating the duty to bargain and that the employes laid off be made whole. We have ordered the City to cease and desist from violating its duty to bargain and to post notices to employes advising them of the City's commitment to bargain in good faith. However, we have not ordered the City to make the laid off employes whole. In our view, such relief is not appropriate where, as here, the employes elected to ratify the 3 percent tentative agreement knowing that the ratified wage settlement would produce layoffs.

Dated at the City of Madison, Wisconsin this 23rd day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

ENDNOTE

1/ To the extent the Teamsters argue that Dickrell's comments to employes also constitute an illegal effort to sabotage the existing tentative agreement, we disagree. Dickrell's remarks were a well intentioned but ill advised effort by the City to make sure that employes approached ratification with their eyes wide open while also opening the door slightly to the possibility of a last minute 2.75 percent settlement even though the City had already ratified the 3 percent deal. In any event, having already determined that Dickrell's remarks violated Secs. 111.70(3)(a)4 and 1, Stats., under an alternative theory of the case, we deem it appropriate to simply set aside Examiner Conclusion of Law 2. However, we think it important to note that we strongly disagree with the Examiner's expressed view that the parties had not reached a tentative agreement/meeting of the minds which included a 3 percent increase. The absence of discussion about the potential for layoffs did not affect the viability of the tentative agreement.

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